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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

APR 25 1996

In the Matter of	)	
	)	
Amendment of Part 20 and 24 of the Commission's Rules — Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	)	WT Docket No. 96-59
	)	
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	)	GN Docket No. 90-314

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To: The Commission

BELLSOUTH COMMENTS

BellSouth Corporation ("BellSouth"), by its attorneys, replies to comments submitted in response to the Commission's *Notice of Proposed Rule Making*, WT Docket No. 96-59, GN Docket No. 90-314, FCC 96-119 (Mar. 20, 1996), *summarized* 61 Fed. Reg. 13133 (1996) ("*NPRM*"). In its initial comments, BellSouth supported the Commission's proposal to eliminate all spectrum caps except the general 45 MHz cap on the amount of broadband CMRS spectrum that can be held by a single entity ("broadband CMRS cap"). BellSouth also recommended that the cellular twenty percent rule be replaced with a controlling interest test and urged the Commission to refrain from broadening its entrepreneurs block licensing rules. BellSouth responds herein to commenters opposing these positions.

I. THERE IS NO BASIS FOR RETAINING ANY SPECTRUM CAPS OTHER THAN THE 45 MHz BROADBAND CMRS SPECTRUM CAP

A number of commenters, including BellSouth, supported the Commission's proposal to eliminate all spectrum caps except for the broadband CMRS cap.[1] BellSouth demonstrated that (i) the United States Court of Appeals for the Sixth Circuit found the cellular/PCS cap to be arbitrary and capricious, concluding that "the FCC provided little or no factual support" for its concern that cellular licensees would engage in anticompetitive behavior;[2] (ii) retention of the cellular/PCS cap was inconsistent with regulatory parity;[3] and (iii) removal of the cellular/PCS cap would serve the public interest by ensuring that spectrum is put to its best and most efficient use.[4]

Inexplicably, despite the Sixth Circuit's determination that there was little or no factual support of the cellular/PCS cap, one commenter urged the Commission to retain the cellular/PCS cap based on the "voluminous record" supporting its adoption.[5] No new evidence was submit-

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1 Ad Hoc Rural PCS Coalition Comments at 14-16; ALLTEL Comments at 8-9; AT&T Wireless Comments at 9-11; BellSouth Comments at 1-10; Cellular Communications of Puerto Rico Comments at 2-6; CTIA Comments at 2, 3-11; GTE Service Corp. Comments at 8; Radiofone Comments at 1-5; Vanguard Comments at 5-6; Virginia PCS Alliance Comments at 8-9.

2 BellSouth Comments at 3-4. *See Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 762-63 (6th Cir. 1995); *see also* Ad Hoc Rural PCS Coalition Comments at 14.

3 BellSouth Comments at 8-10.

4 *See* BellSouth Comments at 6-8.

5 Telephone and Data Systems Comments at 3-4.

ted, however, to cure the record problems observed by the court.[6] Moreover, no party addressed the fact that the cellular/PCS cap must be eliminated under a regulatory parity analysis.

A few commenters maintain that the cellular/PCS cap should be retained to prevent an excessive concentration of PCS licenses.[7] None of these parties, however, explains why the 45 MHz broadband CMRS cap is insufficient to prevent such concentration. Further, the Commission cannot restrict a class of potential licensees from eligibility without substantial economic analysis.[8] There is no such economic analysis in the record. Moreover, the Sixth Circuit cautioned against retention of the rule by stating that, although "the FCC may simply find more support for its conclusions[,] '[n]ot all remands result in the reinstatement of the original decision with merely a more polished rationalization.'"[9] The FCC should heed this warning.

Cellular providers should not be penalized for their existing spectrum holdings. Contrary to the claim of DCR Communications, a cellular licensee cannot expand its system to incorporate additional PCS spectrum at little additional cost.[10] A cellular carrier using PCS to supplement its cellular service must aggregate blocks of 800 MHz cellular spectrum and 2 GHz PCS spectrum

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6 *See* BellSouth Comments at 3; Radiofone Comments at 2.

7 *See* Conestoga Wireless Comments at 4; Mountain Solutions Comments at 10-11; DCR Communications Comments at 12-14; North Coast Mobile Communications Comments at 17; Rendall and Associates Comments at 11; Telephone and Electronics Corporation Comments at 13-15. *Accord* KMTel Comments at 7.

8 *Cincinnati Bell*, 69 F.3d at 764.

9 69 F.3d at 765 (citing *Shurtz Communications, Inc. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992)).

10 DCR Communications Comments at 12-14.

together.[11] This will require the establishment and operation of two separate networks of base stations using different transmitters and antennas. In addition, subscribers to a combined cellular-PCS system will need specialized dual-band phones, which will be more costly than single-band PCS equipment. A PCS-only system will not require two separate networks or dual-band phones. Accordingly, the acquisition of PCS spectrum by a cellular provider will not give it a competitive advantage over PCS-only providers.

II. THE COMMISSION SHOULD ATTRIBUTE TO AN APPLICANT ONLY THAT SPECTRUM OVER WHICH IT MAINTAINS A CONTROLLING INTEREST

In considering the cellular twenty percent attribution rule, the Commission acknowledged that the rule "may restrict the opportunities of certain investors in cellular licensees to participate in PCS *even if they have no meaningful involvement in the management of the cellular system and thus cannot influence its actions.*"[12] It was for this reason that the court in *Cincinnati Bell* struck down the rule as arbitrary and capricious. Specifically, the court found that the cellular attribution rule "bears no relationship to the ability of an entity with a minority interest in a Cellular licensee to obtain a Personal Communications Service license and then engage in anticompetitive behavior."[13] Thus, the attribution rule must bear some relationship to control.

In this proceeding, no commenter has established a relationship between the twenty percent attribution standard and the ability of a cellular provider to engage in anticompetitive

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11 *See* BellSouth Comments at 9.

12 *Amendment of the Commission's Rules to Establish New Personal Communications Services*, GN Docket No. 90-314, *Second Report and Order*, 8 F.C.C.R. 7700, 7746 (1993) (emphasis added). *See* Western Wireless Corporation Comments at 20.

13 *Cincinnati Bell*, 69 F.3d at 759.

conduct. Accordingly, BellSouth concurs with those parties urging the Commission to modify the cellular attribution rule in favor of a control test. The Commission's concern over the difficulty of administering a control test can be substantially mitigated, however, by adoption of BellSouth's bright-line proposal: a cellular licensee's spectrum shall be attributable to any applicant with a 50 percent or greater equity ownership interest, a 50 percent or greater voting interest, or any controlling general partner interest in the cellular licensee.

III. THE COMMISSION SHOULD NOT REVISIT D AND E BLOCK ELIGIBILITY

A few commenters urge the Commission to revisit the spectrum allocation scheme and restrict eligibility for the D and E Blocks. Gulfstream Communications proposed the exclusion of existing CMRS licensees from the D and E Block auctions, as well as a prohibition on CMRS licensees from acquiring 10 MHz PCS licenses for three years after the last 10 MHz auction concludes.[14] Other commenters simply urged the Commission to set-aside the D and E Blocks for small businesses.[15] These proposals should be rejected.

The Commission already has considered how best to satisfy the Congressional mandate to avoid excessive concentration of licenses and promote small business participation. The Commission created six blocks for the provision of PCS: three 30 MHz blocks; and three 10 MHz blocks.[16] It concluded that this allocation plan was the best method for encouraging broad

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[14] Gulfstream Communications Comments at 7-13. *See also* Rendall and Associates Comments at 4.

[15] Iowa, L.P. Comments at 2, 5-6; Mountain Solution Comments at 4; Telephone Electronics Corp. Comments at 4-5.

[16] *Amendment of the Commission's Rules to Establish New Personal Communications* (continued...)

participation in PCS[17] and set aside one-third of the available blocks and almost half of the available licenses for small businesses and entrepreneurs.[18] The Commission specifically found:

> We believe that designating frequency blocks C and F as entrepreneurs' blocks meets the concerns of most of the designated entity comments. Frequency block C provides 30 MHz of spectrum and, thus, satisfies the concerns of those parties who believe they must have this amount of bandwidth to compete effectively. The 10 MHz F block license, on the other hand, fulfills the needs of other designated entities who argued in favor of smaller blocks. Moreover, since the C and F blocks are adjacent, they can be aggregated efficiently by one or more licensees. *This plan also makes available to bidders in the entrepreneurs' blocks 986 licenses, or slightly under fifty percent of all broadband PCS licenses.* Finally, it does not foreclose the possibility for other parties. Bidders ineligible for the entrepreneurs' blocks will have the opportunity to bid on 99 30 MHz licenses throughout the county, as well as 986 10 MHz BTA licenses nationwide.[19]

There is no reason to revisit the PCS allocation plan. The plan has worked as envisioned — almost half of all broadband PCS licenses will be awarded to small businesses and entrepreneurs. Setting aside almost half of the available PCS licenses is more than sufficient to promote small business participation in PCS. Further, the C and F Block set-asides were premised on the availability of other 10 MHz bands for bidders ineligible on the C and F Blocks.[20] Setting aside

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16 (...continued)
Services , GN Docket No. 90-314, *Memorandum Opinion and Order*, 9 F.C.C.R. 4957, 4981-82 (1994).

17 *Memorandum Opinion and Order*, 9 F.C.C.R. at 4978, 4981-82.

18 *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, PP Docket No. 93-253, *Fifth Report and Order*, 9 F.C.C.R. 5532, 5587-88 (1994).

19 *Id.*

20 BellSouth notes that the 10 MHz blocks were adopted to allow PCS and other CMRS providers to aggregate spectrum. Accordingly, KMTel's proposal to prohibit aggregation by cellular and 30 MHz PCS providers should be rejected. *Compare Amendment of the* (continued...)

D and E Blocks for small businesses will harm those entities who withdrew from the A and B Block auctions in anticipation of the D and E Block auctions.[21]

Given these set-asides, there also is no reason to permit small businesses to use installment payments in the D and E Block auctions as suggested by a number of parties.[22] Installment payments already are available for nearly half of all available PCS licenses. There are other methods for ensuring a wider dissemination of PCS licenses to small businesses. Specifically, BellSouth urges the Commission to adopt the proposal to permit spectrum disaggregation and market partitioning.[23] If spectrum can be disaggregated and markets partitioned, small business will have additional opportunities to become PCS providers.

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20 (...continued)
Commission's Rules to Establish New Personal Communications Services , GN Docket No. 90-314, *Memorandum Opinion and Order*, 9 F.C.C.R. 4957, 4981-82 (1994); *with* Rendall and Associates Comments at 4. *See also* Gulfstream Comments at 8-9.

21 Setting aside the D and E Blocks at this time also may devalue the C Block licenses. *See* General Wireless, Inc. Comments at 4.

22 *See, e.g.*, Ad Hoc Rural PCS Coalition Comments at 9-10; AirLink Comments at 4, 11-12; Auction Strategy Comments at 2-3; Cook Inlet Region, Inc. Comments at 3-5; DCR Communications Comments at 10-11; Devon Mobile Communications Comments at 12-13; Gulfstream Communications Comments at 3-5; Iowa, L.P. at 5-6; KMTel Comments at 5; Mountain Solutions Comments at 7-8; National Telecom Comments at 4-5; North Coast Mobile Communications Comments at 12-14; Omnipoint Corporation Comments at 2-4; *but see* BellSouth Comments at 13-14; General Wireless Comments at 4; Telephone and Data Systems Comments at 8-9; U S WEST Comments at 2-5; Vanguard Cellular Systems Comments at 3; WPCS Comments at 5.

23 *See* AT&T Wireless Comments at 11-12.

CONCLUSION

For the foregoing reasons, as well as those provided in its initial comments, BellSouth urges the Commission to eliminate all spectrum caps, other than the broadband CMRS cap, to replace the twenty percent cellular attribution test with a bright-line controlling interest test, and to maintain open eligibility for the D and E Block auctions.

Respectfully submitted,

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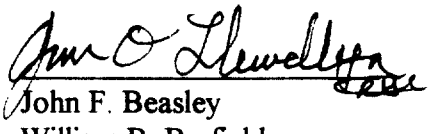
By: 

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